

A missed opportunity at the ICC

How (not) to use the VCLT to give meaning to the 'interests of justice'

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On 5th March 2020, the Appeals Chamber (AC) of the International Criminal Court (ICC) unanimously [authorized](#) the Office of the Prosecutor (OTP) to commence an investigation into the situation in Afghanistan. This decision reversed the controversial Pre-Trial Chamber (PTC) [decision](#) which, citing the 'interests of justice' (IoJ) clause, had refused to authorize the investigation [requested](#) by the OTP. However, the AC's decision failed to shed any light on the problematic reading of the IoJ clause by the PTC using interpretative tools provided by the Vienna Convention on the Law of Treaties. In the end, the use of the VCLT to cure the indeterminacy of the IoJ fails. The content of the IoJ remains obscure.

The PTC's unanimous rejection of an investigation pursuant to Article 15(4), in a situation under [preliminary examination since 2007](#), had resulted in scrutiny of a judicially unexplored and ambiguous provision of the Rome Statute. This was the first rejection of a request by the Prosecutor for an investigation while exercising her *proprio motu* power under Article 15(3). Moreover, it was the first judgment that invoked the interests of justice clause under Article 53.

According to Article 53, the Prosecutor is obligated to consider three factors to decide if there is a reasonable basis to proceed with an investigation: jurisdiction of the Court, admissibility of the potential cases, and the interests of justice. While the first two factors are positive, the third one is countervailing in nature. In other words, the Prosecutor has to establish the first two factors expressly but isn't required to show that opening an investigation is *in* the interests of justice – because in the presence of the first two factors, opening an investigation is presumed to further the cause of justice. In contrast, when the Prosecutor [decides](#) *not* to open an investigation based exclusively on the reasons of IoJ, she has to [establish](#) the same before the PTC.

Applying the VCLT to the Rome Statute – a matter of course?

The [Vienna Convention on the Law of Treaties \(VCLT\), 1969](#) provides the general rule of treaty interpretation, which reflects customary international law. Its customary nature crystallized under Article 31-32 of the VCLT has been [affirmed](#) by the International Court of Justice.

While scholars have [debated](#) and [questioned](#) the appropriateness of using the generic framework of the VCLT in interpreting specific international criminal treaties, their [concerns](#) largely arise out of cases regarding the construction of crimes and effects on defendants.

The International Criminal Tribunals for the Former Yugoslavia (1993) and Rwanda (1994) came into being *qua* resolutions adopted by the UNSC, with their statutes attached to said resolutions. Although the governing statutes weren't [treaties](#) *per se*, their application and [interpretation](#) were still shaped by the VCLT. In contrast, the ICC, unlike its predecessors, has been established by a multilateral treaty, the Rome Statute. The Court has time and again made recourse to the VCLT and has [confirmed](#) its applicability for the interpretation of the Statute.

The primary interpretive principle under Article 31(1) provides the text of a treaty to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Judges of international criminal tribunals, however, have used various interpretive principles arising out of Article 31, i.e. ordinary meaning, object and purpose and drafter's intention, in various instances, instead of using it as one single interpretive rule. Although such an exercise of interpretation by the judges doesn't run foul to Article 31 as such, it results in [uncertainty](#) as to which is paramount for the matters of international criminal law. In the absence of a regime-specific framework, the VCLT [remains](#) the tool for interpreting the Rome Statute. Though the extent of applicability of the VCLT within the Rome Statute remains an unanswered question, the IoJ clause highlights limitation.

"Interests of Justice" and the VCLT – an exercise in interpretation

There are [differing interpretations](#) of the "interests of justice" keeping in mind questions of [peace](#) versus [justice](#) within the Statute. [Scholars arguing for a broader meaning of the IoJ clause](#) have attempted to use the VCLT as a tool of interpretation. They have found the clause to include factors of peace and security. Following the same argument, Afghanistan's [PTC](#) ruling incorporated 'complexity and volatility of the political climate' (para 94) within the interests of justice.

However, the question that arises is whether the application of VCLT provides us with any factors, let alone extra-legal factors such as peace, politics, geo-political relations, etc., to be read into the IoJ.

The phrase IoJ was first introduced to the Rome Statute discussions in 1996 by the British representative through a [discussion paper](#), proposing an amendment to the then Article 26(4) (ILC Draft). This vested the Prosecutor with the power to not proceed with a *prosecution* if it were *not* in the interests of justice. The paper included old age or infirm health of the accused as examples. In 1997, the gravity of the crime and interests of victims were proposed as positive balancing factors. During the Zutphen negotiations, [Article 47](#) was made to reflect that the question whether a subsequent *prosecution* would be in the interests of justice should serve as a consideration with regards to opening an *investigation*, while the *travaux* tell us that IoJ was envisaged originally for the *initiation of prosecution* rather than an investigation. The requirement was incorporated in Article 53(2)(c), but no such clarity was provided regarding the opening of an investigation under Article 53(1)(c).

The literal, contextual, and teleological interpretation of the IoJ suggests that it means 'legal interests affecting or influencing international criminal justice', meaning that the factors needed to offset the gravity of crime and the interests of victims must be *legal* in nature and related to international criminal justice. In the light of the good faith obligation, which encompasses the principle of effectiveness, the meaning favours international investigation and prosecution. Accordingly, the phrase has a narrow scope.

Thus, the VCLT only serves to determine whether the IoJ has a broad or narrow meaning. It allows us to trace the outer scope of the phrase but not its contents and doesn't provide an understanding of the factors to be included within the IoJ. And it is rightly so, as such an indeterminate term can't be defined in the abstract, or even applied concretely.

Assessment of "Interests of Justice" at the ICC – a practical question?

While policy factors are non-legal, they are nevertheless important in guiding the Prosecutor's decision. In practice, factors like state cooperation and budgetary limitations of the OTP become relevant in assessing the feasibility of carrying out an investigation. However, lack of feasibility doesn't necessarily negate the appropriateness of an investigation or the IoJ.

For example, in 2014, the [Trial Chamber](#) found the Government of Kenya guilty of non-compliance because of their failure to cooperate with the OTP investigations. Similarly, the OTP in 2012 acknowledged the difficulties it faced conducting the preliminary examination in Afghanistan due to security concerns as well as limited state cooperation. For the benefit of intra-institutional governance, the OTP considers these factors as a matter of policy. However, these weren't factored into the IoJ clause and no decision against an investigation was taken by the Prosecutor in her [request for authorization](#).

Having recognised the limitations of the VCLT, judges can use policy factors in their interpretation. However, to be clear, the same cannot be done in the name of VCLT.

Taking two years to adjudicate the Afghanistan request, the PTCs majority opinion indulged in speculative exercise and nitpicking of facts by doubting the availability of state cooperation, evidence, and the potential accused persons. The decision doesn't explain how it undertook the task of locating the content of the IoJ clause. In contrast, Judge Mindua in his [separate opinion](#) (para 29) indicated using Article 31-32 VCLT, but the application wasn't express. While he agrees with the Prosecutor that the feasibility of an investigation isn't a 'separate and self-standing factor', reading it with the Court's alleged budget constraints and absence of state cooperation, he holds it as a relevant consideration.

On appeal, there were multiple submissions by amici curiae. Only the submission by [Professor Jennifer Trahan](#) rightly undertook the task of culling out a meaning of IoJ using the VCLT, arguing for a narrow understanding. She concurs that the factors which can be read into IoJ aren't exhaustive but that they must be legal. However, in its decision, the Appeals Chamber [failed to deliberate](#) on the meaning of the IoJ

clause. Following the previous jurisprudence of the PTC, the Court merely reaffirmed the negative formulation of Article 53(1)(c) and the balancing test which is required for IoJ *vis à vis* the gravity of the crime and interests of victims.

The [Appeals Chamber](#) held that while authorizing a *proprio motu* initiation of an investigation, the PTC cannot review the IoJ requirement even though it might have been a consideration for the Prosecutor. Consequently, the PTC under Article 15(4) must only check if there is a reasonable factual basis, i.e. whether crimes have been committed within a situation and potential cases would appear to fall within the jurisdiction of the Court.

A lost opportunity

Having ruled that the PTC has no power to review the Prosecutor's assessment of the 'reasonable basis' under Article 53(1)(a-c) in a case of *proprio motu* initiation of an investigation, it is understandable that the Chamber refrained from substantiating on the IoJ clause for the sake of judicial economy. Doing so, the Court has however lost an opportunity to clarify the contents of the existing constructive ambiguity and to reconcile the question of the application of VCLT within the Rome Statute. Therefore, although the Afghanistan pre-trial decision was bad in law, it was a welcome attempt to put to rest the uncertainty couched in the interests of justice.

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